IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1223

MAURICE SMITH, LAWRENCE BLACKWELL, J. C. PATTERSON, GEORGE KELL, Individually and as Commissioners of the Arkansas State Highway Commission; and HENRY GRAY, Individually and as Director of the Arkansas State Highway Department,
Petitioners,

v.

ARKANSAS STATE HIGHWAY EMPLOYEES LOCAL 1315, JAMES P. ROWELL, ROBERT C. CONLEY, JACK FRANKS, EDWIN SHINN, SPENCER Y. LAND, WALTER MAYS, ROBERT WATSON and A. D. TATE,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

JOHN T. LAVEY
1735 Tower Building
Little Rock, Arkansas 72201
Attorney for Respondents

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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QUESTIONS PRESENTED

1. Did the appellate court err when it affirmed the trial court's finding and conclusion that the grievance procedure promulgated by the Arkansas State Highway Commission was unconstitutional in that it prohibited the union from filing and processing a step 2 written grievance prepared by the aggrieved employee to the appropriate employer representative of that commission?

2. Is respondents' atttorney entitled to a court awarded attorney's fee to be paid by petitioners for the preparation of this brief in opposition?

STATUTORY PROVISION INVOLVED

42 U.S.C. §1988

> . . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

ARGUMENT: REASONS FOR DENYING THE WRIT

I. The Appellate Court Has Not Decided an Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court.

The appellate court affirmed the two critical findings made by the trial court regarding the right of public employees to join a union. Those lower courts specifically found that such a right encompassed the right of the union to file a grievance on behalf of its members and to assist in the presentation of that grievance, which right was one aspect of a public employee's right to petition government for the redress of grievances. In support of this proposition, the trial court with the approval of the appellate court relied on *United Mine Workers of America, District 12 v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964); *Parsons v. Carmichael*, 82 L.R.R.M. 215 (E.D. Ark. 1972) and *City of Fort Smith v. Arkansas State Council No. 38, AFSCME, AFL-CIO*, 245 Ark. 409, 433 S.W. 2d 153 (1968).

The backdrop of relevant law is that in Arkansas a union can sue and be sued. *Thomas v. Dean*, 245 Ark. 446, 432 S.W. 2d 771 (1968). And public employees have a right to organize and become members of a union. *Potts v. Hay*, 229 Ark. 830, 315 S.W. 2d 826 (1958). Although it is not mandatory that a public employer bargain collectively with a union, the law in Arkansas is clear that a union can process grievances on behalf of public employees with their public employers. *City of Fort Smith v. Arkansas State Council No. 38 AFSCME, AFL-CIO, supra.*

In the *Brotherhoood of Railroad Trainmen* case, the Brotherhood established a legal department throughout the United

States which recommended to its members and their families the names of lawyers to represent them in railroad personal injury litigation. The Supreme Court of Appeals of Virginia affirmed a trial court's injunction enjoining the Brotherhood from implementing such a procedure in the State of Virginia. This Court reversed that decision and stated:

> It cannot be seriously doubted that the First Amendment's guarantees of free speech, *petition* and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of the Brotherhood to advise concerning the need for legal assistance—and, most importantly, what lawyer a member could confidently rely on—is an inseparable part of this constitutionally guaranteed right to assist and advise each other.

Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, supra at 5-6 (Emphasis added). In the ***United Mine Workers*** case, the union employed a salaried licensed attorney to represent many of its members who wished to retain him to represent them in workers compensation cases. The trial court found that the union's employment of such an attorney constituted the unauthorized practice of law and enjoined the union from employing an attorney on a salary or retainer basis to represent its members in workers compensation cases and any and all other claims which they may have under the law

of Illinois. The Illinois Supreme Court affirmed the decision of the trial court, but this Court reversed and held in pertinent part:

> . . . We hold that the freedom of speech, assembly and *petition* guaranteed by the First and Fourteenth Amendments give petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights.
>
> We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press. "All these, though not identical, are inseparable". The First Amendment would, however, be a hollow promise, if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.
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> . . .
>
> . . . "Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones. And the rights of free speech and a free press are not confined to any field of human interest."

United Mine Workers of America, District 12 v. Illinois State Bar Association, supra at 221-223 (Emphasis added) (Cita-

tions omitted). By parity of reasoning, Robert Watson and W. E. Hughes could request the union to file and process a written grievance on their behalf to the appropriate employer representative of the Arkansas State Highway Commission. If it violates a union's First Amendment right to petition for the redress of grievances for its members to prohibit it from supplying legal aid to them, *a fortiori* petitioners have violated that right of the union by promulgating a grievance procedure prohibiting it from filing and processing a step 2 written grievance prepared by the aggrieved employee to the appropriate employer representative.

In a case before Judge J. Smith Henley, now a member of the Eighth Circuit, Bill S. Clark, one of the attorneys of record for the petitioners in this case, conceded:

> Both sides recognize that Arkansas municipal employees have the right under Amendment 34 and Act 101 of 1947 to join a labor union, and that the city would have no lawful right to discharge them merely for joining the union involved here or for "union activities". Both sides also seem to be in agreement with the proposition that while plaintiffs had a right to join the union and to use the union as an agent for the presentation of grievances, the City was not required to bargain collectively with the Union and that generally municipal employees have no right to strike against their employer.

Parsons v. Carmichael, supra at 2514. In the *City of Fort Smith* case, the Arkansas Supreme Court stated:

> During the oral argument, counsel for the appellees, envisaging the possibility that the city might not be compelled to bargain collectively, suggested that nevertheless the union's right to present its grievances to city officials ought to be recognized. No doubt that right does exist. The Bill of Rights protects the rights of the people to assemble and

> to petition the government by address or remonstrance. Ark. Const. Art. 2, §4. . . .

City of Fort Smith v. Arkansas State Council No. 38 AFSCME, AFL-CIO, supra at 245 Ark. 414, 433 S.W.2d 156. Clearly, the trial and appellate courts' critical findings listed above are supported by record evidence and legal precedent. See also Morris, *Public Policy and the Law Relating to Collective Bargaining in the Public Service*, 22 Sw L.J. 585, 591-592 (1968). Clearly, when petitioners refused to allow the union to file and process the grievances of Robert Watson and W. E. Hughes it violated the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. §1983.

Petitioners' prime contention is that, if the appellate court's decision is allowed to stand, it will require the petitioners to recognize and bargain collectively with the union. This contention does not withstand scrutiny. Petitioners promulgated a grievance procedure which allows representatives of the union to represent Arkansas State Highway Department employees at its second step. Assuming *arguendo*, and without conceding the point, that the grievance procedure as promulgated by petitioners is constitutional, it allows a representative of the union to represent an employee of the Arkansas State Highway Department at step 2. Petitioners cannot contend that such representation by the union at step 2 of the grievance procedure requires it to recognize and bargain collectively with the union. If such representation by the union does not require the petitioners to recognize and bargain collectively with the union, how does the additive of allowing the union to process and forward a step 2 written complaint preferred by the employee to the appropriate employer representative transform the grievance procedure into a mandate that petitioners recognize and bargain collectively with the union? The answer is obvious—it does not. Petitioners have promulgated a grievance procedure, which minimally recognizes the First Amendment right of the union

to petition government for the redress of grievances of its members by allowing the union to represent its members at the step 2 level. But that grievance procedure was intended to curtail the union's effectiveness in representing its members and presenting their grievances to the appropriate employer representative. It works to the detriment of a member of the union. As an example, the member may have a grievance but may not know how to properly write it out to delineate the issue and/or dispute with the Arkansas State Highway Department. If the grievance is inartfully drafted by one of the union's members, the union may not be able to properly represent that member at step 2. In such a circumstance, the member's right to join a public union and to have that union represent him or her is emasculated. The appellate court's decision assures to employees of the Arkansas State Highway Department that their right to membership in the union is not passive but does include the right to have the union affirmatively represent him or her in the drafting and presentation of their grievance to their employer. It would appear that it would be to petitioners' interest to have its employees satisfied with their working conditions, and, if they are not, to provide them with a viable mechanism to vent their dissatisfaction. A bona fide grievance procedure is such a mechanism and often is therapeutic. As Justice William O. Douglas stated:

> . . . The agreement is to submit all grievances to arbitration, not merely those the court would deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware.

United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564, 80 S. Ct. 1343, 4 L.Ed. 2d 1403 (1960). By allowing the union to process and forward a written grievance prepared by the aggrieved employee to the appropriate employer representative and to represent that aggrieved employee at step 2, petitioners' interest appears to be

well served. It must be assumed that the grievance procedure was promulgated by petitioners in good faith. This must mean that, if an employee has a grievance, petitioners must want that grievance adjusted. This is going to have a therapeutic effect on the employee and to make that employee a better worker for the Arkansas State Highway Department.

When petitioners promulgated the challenged grievance procedure, it recognized the distinction between allowing employees to process a grievance and bargaining collectively with the union. The challenged grievance procedure does not amount to collective bargaining between petitioners and the union, but really amounts to a full disclosure procedure for both the aggrieved employee and the employer. The grievance procedure allows the employee, with the assistance of the union at step 2, to insure that all of the facts from the employee's standpoint are made available to the appropriate employer representative. After the employer representative obtains all of the facts and available evidence from the employee, he or she makes further investigation into the matter. Once that investigation is completed the employer representative makes a written report to the Director of the Arkansas State Highway Commission, who analyzes that report and ultimately makes a decision, which is final and binding. There is no bargaining whatsoever, and the grievance procedure is merely a conduit of allowing the employee, with assistance from the union, to ultimately get his or her view of the dispute to the director for his ultimate decision. The fact that the union, under the decision of the appellate court, files and forwards a step 2 written complaint prepared by the aggrieved employee does not transform the grievance procedure into a collective bargaining mechanism between the union and petitioners. Clearly, in the extant case, the appellate court did not decide an important question of federal law but just applied well crystalized legal principles to the simple facts before it. The petitioners' contention that the appellate court decided an important question of federal law is frivolous and must be rejected.

II. **The Decision of the Appellate Court Does Not Conflict With the Decision of the United States Court of Appeals for the Seventh Circuit.**

Petitioners contend that the decision in the extant case conflicts with *Hanover Township Federation of Teachers Local 1954, AFL-CIO v. Hanover Community School Corporation*, 457 F.2d 456 (7th Cir. 1972). In *Hanover*, the local union was attempting to bargain collectively with the school board but the latter refused to engage in meaningful bargaining with the union. During those negotiations, the school board mailed employment contracts to individual teachers requesting them to sign and return them within three days. In ruling that there was no constitutional duty to bargain collectively with a union, the Seventh Circuit stated:

> For purposes of decision we may therefore, assume that the procedure followed by defendants in mailing individual contracts to union members while collective bargaining discussions were in progress would have been an unfair labor practice if the Labor-Management Relations Act were applicable, and that this procedure tended to undermine the economic strength of the union. It may also have deprived the teachers of benefits they sought to obtain by exercising their First Amendment rights. That amendment, however, provides no guarantee that a speech will persuade or that advocacy will be effective. Since the coverage of the relevant parts of the Civil Rights Act is no broader than the constitutional protection, those statutes are not equivalent to the Labor-Management Relations Act in the field of public employment. The district court correctly relied on our holding in Indianapolis Education Assn. v. Lewallen that ". . . there is no constitutional duty to bargain collectively with an exclusive bargaining agent."

Id. at 461. *Hanover* stands for the proposition that 42 U.S.C. §1983 does not amount to a "baby" National Labor Relations Act for public employees. In the extant case, respondents are not contending that petitioners have perpetrated an unfair labor practice by bargaining in bad faith but are contending that they violated the right of the union to file a written grievance on behalf of its members and to assist them in making a presentation of that grievance in violation of the First Amendment.

The *City of Charlotte* case did not involve the right of a union to file a grievance on behalf of its members and to assist them in the presentation of that grievance. That case stands for the proposition that a public employer may promulgate reasonable standards to justify its refusal to check-off union dues without violating the equal protection clause of the Fourteenth Amendment. The Supreme Court found that the City of Charlotte had established reasonable criteria based on cost to justify its refusal to check-off union dues. *City of Charlotte v. Local 660, International Association of Firefighters*, 426 U.S. 283 (1976). That case does not conflict with the extant case. To conclude, there is no conflict between the extant case and the *Hanover* and *City of Charlotte* cases.

III. **The Attorney for the Respondents is Entitled to a Court Awarded Attorney's Fee to Be Paid by Petitioners.**

The undersigned attorney did not receive a fee from the union for the services he performed for it before the trial and appellate courts, although the Eighth Circuit awarded a $300.00 fee. Additionally, although the union is going to pay for the printing of this brief, it is not going to be able to pay the undersigned attorney a fee for writing this brief. Therefore, in the circumstances of this case, the Court is requested to order petitioners to pay the undersigned attorney a reasonable attorney's fee. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, provides that the Court in its discretion may award an attorney's fee to the prevailing party in cases involving violations

of 42 U.S.C. §1983. This act was signed by President Ford on October 19, 1976 and its legislative history and judicial interpretation establish that its application is retroactive to all pending cases. *Hutto v. Furney*, 57 L.Ed. 2d 522 (1978), *Commonwealth of Pennsylvania v. O'Neill*, 431 F.Supp. 700 (E.D.Pa. 1977) and *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977). If the court decides to award the undersigned an attorney's fee to be paid by petitioners the undersigned will be most happy to submit an affidavit to the Court detailing the time spent briefing this case to this Court.

CONCLUSION

For the reasons stated above, the Court should deny the petition.

Respectfully submitted,

JOHN T. LAVEY
1735 Tower Building
Little Rock, Arkansas 72201
Attorney for Respondents

Certificate of Service

I hereby certify that I have on this .... day of March, 1979, served copies of the foregoing Brief for Respondents in Opposition by depositing them prepaid in the U.S. Mail on Mr. Bill S. Clark, Attorney at Law, 2000 First National Bank Building, Little Rock, Arkansas 72201, and on Mr. Thomas B. Keys, Attorney at Law, Arkansas State Highway Department, 9500 New Benton Highway, Little Rock, Arkansas 72209.

JOHN T. LAVEY